Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

NO. 75-47

ELAINE M. ORR,

Petitioner,

v.

FRANK R. MacNEILL & SON, INC.,

Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

ROBERT W. HERVEY, ESQUIRE and
RICHARD H. W. MALOY
& ASSOCIATES, P.A.
370 Minorca Avenue
Coral Gables, Florida 33134 (443-2551)

MIAMI REVIEW — 371-4853 — 377-3721

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TITLE 42.—
THE PUBLIC HEALTH AND WELFARE

SUBCHAPTER VI.—
EQUAL EMPLOYMENT OPPORTUNITIES

§ 2000e. Definitions.

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trust, unincorporated organizations, trustees, trustees in bankruptcy, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty-five or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include (1) the United States, a corporation wholly owned by the Government of the United States, an Indian Tribe, or a State or political subdivision thereof, (2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501(c) of Title 26: Provided, That during the first year after the effective date prescribed in subsection (a) of section 716, persons having fewer than one hundred employees (and their agents) shall not be considered employers, and, during the second year after such date, persons having fewer than seventy-five employees (and their agents) shall not be considered

employers, and during the third year after such date, persons having fewer than fifty employees (and their agents) shall not be considered employers.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer or to procure for employees opportunities to work for an employer and includes an agent of such a person; but shall not include an agency of the United States, or an agency of a State or political subdivision of a State, except that such term shall include the United States Employment Service and the system of State and local employment services receiving Federal assistance.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer,

or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is (A) one hundred or more during the first year after the effective date prescribed in subsection (a) of section 716, (B) seventy-five or more during the second year after such date or fifty or more during the third year, or (C) twenty-five or more thereafter, and such labor organization—

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended;

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by an employer.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

(Pub. L. 88-352, title VII, § 701, July 2, 1964, 78 Stat. 253; Pub. L. 89-554, § 8(a), Sept. 6, 1966, 80 Stat. 662.)

§ 2000e—2. Unlawful employment practices.

(a) Employer practices.

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin.

(b) Employment agency practices.

It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

(c) Labor organization practices.

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) Training programs.

It shall be an unlawful employment practice for any employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs to discriminate against any individual because of his race, color, religion, sex, or national origin in admission to, or employment in, any program established to provide apprenticeship or other training.

(e) Businesses or enterprises with personnel qualified on basis of religion, sex, or national origin; educational institutions with personnel of particular religion.

Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization, or joint labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise, and (2) it shall not be an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if such school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society, or if the curriculum of such school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion.

(f) Members of Communist Party or Communist-action or Communist-front organizations.

As used in this subchapter, the phrase "unlawful employment practice" shall not be deemed to include any action or measure taken by an employer, labor organization, joint labor-management committee, or employment agency with respect to an individual who is a member of the Communist Party of the United States or of any other organization required to register as a Communist-action or Communist-front organization by final order of the Subversive Activities Control Board pursuant to the Subversive Activities Control Act of 1950.

(g) National security.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to fail or refuse to hire and employ any individual for any position, for an employer to discharge any individual from any position, or for an employment agency to fail or refuse to refer any individual for employment in any position, or for a labor organization to fail or refuse to refer any individual for employment in any position, if—

(1) the occupancy of such position, or access to the premises in or upon which any part of the duties of such position is performed or is to be performed, is subject to any requirement imposed in the interest of the national security of the United States under any security program in effect pursuant to or administered under any statute of the United States or any Executive order of the President; and

(2) such individual has not fulfilled or has ceased to fulfill that requirement.

(h) Seniority or merit system; quantity or quality of production; ability tests; compensation based on sex and authorized by minimum wage provisions.

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under the subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

(i) Businesses or enterprises extending preferential treatment to Indians.

Nothing contained in this subchapter shall apply to any business or enterprise on or near an Indian reservation with respect to any publicly announced employment practice of such business or enterprise under which a

preferential treatment is given to any individual because he is an Indian living on or near a reservation.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance.

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number of percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area. (Pub. L. 88-352, title VII, § 703, July 2, 1964, 78 Stat. 255.)

REFERENCES IN TEXT

The Subversive Activities Control Act of 1950, referred to in subsec. (f), is classified principally to subchapter I of chapter 23 of Title 50, War and National Defense.

EFFECTIVE DATE

Section effective one year after July 2, 1964, see section 716(a) of Pub. L. 88-352, set out as a note under section 2000e of this title.

TITLE 29—LABOR § 206(d)(1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

No. 72-698-Civ-NCR

ELAINE M. ORR

Plaintiff

vs.

FRANK R. MacNEILL & SON, INC.

Defendant

FINDINGS OF FACT AND CONCLUSIONS OF LAW

[Filed June, 11, 1973]

Plaintiff Elaine M. Orr has brought suit against Frank R. MacNeill & Son, Inc., her former employer, alleging discrimination on the basis of sex, in violation of Title 7 of the Civil Rights Act of 1964. She filed a Complaint with the Equal Employment Opportunity Commission and received the notice of a right to sue and filed suit within the time limitation thereafter.

The testimony revealed a fairly predictable drama. Plaintiff began working for the defendant corporation, a general insurance agency, in 1952 and at that time there were only four employees. Then she assisted in bookkeeping and the handling of claims, distribution of mail, and in whatever way possible. By January, 1971, when plaintiff terminated her employment because the defendant refused to increase her salary to match that of the other

two department managers who were also vice presidents (one is the equivalent), there were 60 employees.

Two persons are the driving forces in the defendant corporation: Frank R. MacNeill, nearly 88, who still spends at least three to four hours per working day in the office, and his son, Malcolm MacNeill, the vice president of the corporation, who testified that he is in charge of the operations of the company. The plaintiff claims that the senior MacNeill told her to come talk with him if she ever had any problems and that he was still running the show.

The Court concludes that these apparently conflicting attitudes on the part of the principal officers of the defendant corporation reflect the feelings of these two officers and may account in some measure for the events as they unfold.

During the years 1967 through 1970 the defendant agency was an organization divided into four departments: fire, casualty, accounting and claims. Plaintiff had been a vice president of the corporation since 1964 and was in charge of the accounting department. Bruns was also a vice president and he was in charge of the fire department; Moore was not a vice president and was in charge of the casualty section; Mr. Rogan was in charge of the claim section, but a separate corporation had been set up to handle claims and he was the president of that corporation, a subsidiary of the defendant, but Rogan was not a stockholder of the separate corporation.

The following is a table setting forth the comparative salaries of the four department heads during the years in question.

SALARIES

As of April	ACCOUNTING ORR	FIRE BRUNS	CLAIMS ROGAN	CASAULTY MOORE
1966	$10,400	$10,400	$ 9,100	$ 8,996
1967	11,700	11,310	10,010	10,010
1968	12,012	15,002	14,001	10,816
1969	13,000	15,522	15,600	12,012
1970	14,040	18,018	18,018	14,040
1971		20,072	20,072	16,120

The following is a comparison of the bonuses paid to the four department heads during these years:

BONUS

For the year				
1969	$ 500	$1,000	$ 500	$ 500
1970	3,500	3,500	3,500	3,500
1971	1,500	3,500	3,500	2,500

Malcolm MacNeill testified Bruns' salary was increased ahead of plaintiff's to reward him for bringing in an account and that this was the reason he received a much bigger bonus in 1969.

In 1967 when Bruns went ahead of her salary-wise, plaintiff made her complaint to Frank MacNeill; the older MacNeill advised her that his son would not approve of her making as much as a man but he would try to work it out and asked her to be patient. In January, 1969, she repeated her complaint to the older MacNeill who again advised her that Malcolm would not approve of her making as much as a man but requested that she let him discuss it and he would try to work it out. Nine months later she advised the older MacNeill she would quit unless something was worked out and in December, 1970 she announced she was resigning, effective January, 1971. He

further assured her that she wouldn't leave the company; that she would be back and that the company would keep her license, which it not only did but continued to make payments to her for its use until April, 1972. He also responded favorably to her complaints that she felt she had earned equivalent salary and was worth it. In March, 1972 he again acknowledged that he could replace any of the men easier than he could her.

Defendant's contention is that the production departments are the important part of their business and without the production you don't need accounting. Malcolm MacNeill testified that the accounting department is in no way as important as the other departments and insurance companies never pay personnel in accounting departments as much as personnel in production departments; and that this situation exists in general agencies as well.

Defendant's contention was disputed by the other two department heads, Mr. Bruns and Mr. Rogan, and the court finds an insurance agency operation of this size depends with success upon the efficient functioning of all of its departments.

Malcolm MacNeill also contends that plaintiff was an excellent employee until the last two or three years, but that her work fell off at that time; that appraisal would seem to coincide chronologically with the plaintiff's first complaint about the fact that another department manager had been increased from the same salary to one in excess of that received by her. Evidently, the disaffection was not very severe as plaintiff was receiving substantial annual raises during the period of time when her work was alleged to have decreased in quality.

Following plaintiff's resignation, defendant hired her replacement, Mr. Gaskins, who was hired at almost the same salary plaintiff had been receiving although he had considerably less experience. Defendant claims this evidence supports its position, but on the contrary it underlines the discrimination exercised against plaintiff.

Although it may well be that the plaintiff and Malcolm MacNeill had a personality clash and were simply unable to get along, this court finds that the plaintiff has shown a clear case of discrimination on the part of the defendant towards her in connection with differentiation of salaries received by her vis-a-vis that received by Mr. Bruns, in particular, and also Mr. Rogan.

Plaintiff filed suit only for the total differentiation in salaries of $12,480 claimed to be the amount between her salary during the years in question and that of Mr. Bruns and for the differentiation in bonuses totalling $2,500.00.

The court finds that the plaintiff has shown discrimination in salary based on sex.

CONCLUSIONS OF LAW

1. Plaintiff has clearly shown the salary discrimination she suffered when her salary is compared with that of Mr. Bruns resulted from sexual discrimination.

2. Despite this clear showing, it is still incumbent upon plaintiff to show that she was performing substantially equal work with Mr. Bruns and Mr. Rogan in order to recover from the defendant. This is not the typical production line case[1] or retail clerks[2] or bank tellers[3] situation where the job requirements can be calibrated in minute detail. In this situation, defendant created four departments, three of them headed either by vice presidents of defendant-corporation or a president of a wholly owned subsidiary who was performing virtually the same functions as a vice president. Titles alone do not constitute substantially equal work; however, in the instant case defendant had created an organizational structure in which plaintiff's duties as a department head involved work in the other departments as well. In addition, in 1967 she actually was the highest paid of the four department heads, a situation which rapidly changed thereafter so that the two male department managers who were officers were paid more than she and the male department manager who was not an officer was brought even with plaintiff's salary in 1970.

3. The Court agrees with the conclusion in Hodgson v. Robert Hall Clothes, Inc., 326 F.Supp. 1264 (D.Del. 1971), that the Equal Pay Act "means that if the differential in pay is, in whole or in part, based upon sex, it is not based upon factors other than sex. Only if sex plays no part in the wage differential is it beyond the condemnation of the Act." Id. at 1275.

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[1]Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905, 90 S.Ct. 1696 (1970); Shultz v. Amer. Can Co., 424 F.2d 356 (8th Cir. 1970); Shultz v. Corning Glass Works, 319 F.Supp. 1161 (W.D.N.Y. 1970).

[2]Hodgson v. City Stores, Inc., 332 F.Supp. 942 (M.D.Ala. 1971); Hodgson v. Robert Hall Clothes Inc., 326 F.Supp. 1264 (D.Del. 1971).

[3]Hodgson v. Amer. Bk Comm., 447 F.2d 416 (5th Cir. 1971).

4. As set forth in Hodgson v. City Stores, Inc., 332 F.Supp. 942 at 947 (M.D.Ala. 1971), the law is now well settled that the positions to be compared need be only substantially similar or substantially equal in effort, skill, or responsibility and working conditions, citing Hodgson v. Amer. Bk of Com., 447 F.2d 416 (5th Cir. 1971) and Shultz v. Amer. Can. Co., 424 F.2d 356 (8th Cir. 1970).

5. The Court concludes that, based on the unique fact situation in this case, plaintiff is entitled to recover differences in salary between her salary and that of Mr. Bruns for the years 1968 thru 1970, inclusive. See Shultz v. Wheaton Glass Co., 421 F.2d 259 (3rd Cir. 1970), cert. denied in 398 U.S. 905, 90 S.Ct. 1969 (1970).

The Court concludes that the jobs in this case are not as "substantially equal" as the ones in other cases[4] where recovery has been permitted; however, to deny plaintiff recovery because of the dissimilarities when such blatant discrimination exists, would be to restrict Title VII of the Civil Rights Act by the Equal Pay Act—a construction surely not intended by Congress or approved by the Courts. See Shultz v. Wheaton Glass Co., supra.

6. The Court concludes the plaintiff is not entitled to recover on the alleged discrimination in connection with the yearly bonuses because of its finding that the differentiation was based on reasons other than sex.

7. Counsel are to submit attorneys' affidavits in connection with the award of attorneys' fees within ten

[4]e.g. Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228 (5th Cir. 1969).

days and the Court will order attorneys' fees based on the affidavits submitted and the consideration of the record without a hearing.

DONE AND ORDERED at Miami, Florida, this 11th day of June, 1973.

/s/ Norman C. Roettger, Jr.
United States District Judge

cc-Robert W. Hervey, Esq.
370 Minorca Avenue
Coral Gables, Florida 33134

cc-Alan G. Greer, Esq.
Frates, Floyd, Pearson, Stewart,
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[TITLE OMITTED]

FINAL JUDGMENT FOR PLAINTIFF

[Filed June 20, 1973]

The above-entitled action came on for trial before the Court sitting without a jury; the Court heard the testimony and considered the evidence, and thereafter made its Findings of Fact and Conclusions of Law. Based on said Findings of Fact and Conclusions of Law made and entered herein,

IT IS ORDERED AND ADJUDGED that Plaintiff, ELAINE M. ORR, recover judgment against Defendant, FRANK R. MacNEILL & SON, INC., in the sum of Twelve Thousand Four Hundred Eighty ($12,480.) Dollars, and further recover from Defendant attorney's fees and costs to be assessed and taxed upon final determination by the Court.

DONE AND ORDERED in Chambers at Miami, Dade County, Florida, this 28 day of June, 1973.

/s/ Norman C. Roettger, Jr.

United States District Judge

United States Court of Appeals,
Fifth Circuit.

No. 73-3063.

Elaine M. ORR, Plaintiff-Appellee,
v.

FRANK R. MacNEILL & SON, INC.,
Defendant-Appellant,

April 10, 1975.

In an action for damages from sex discrimination in compensation to an employee, the plaintiff employee recovered in the United States District Court for the Southern District of Florida, at Miami, Norman C. Roettger, Jr., J., and the employer appealed. The Court of Appeals, Jones, Circuit Judge, held that evidence as a whole failed to sustain the district court's determination that the job of the plaintiff was "substantially equal" to other jobs, performed by men, or that there had been any discrimination by reason of sex. Where duties of the various employees were greatly dissimilar, even though each was manager of a department, the performance of their jobs could not be characterized as equal work for purposes of the sex discrimination statutes.

Reversed and remanded.

1. Courts — 406.3(2)

Court of Appeals accepted district court's determination on credibility of witnesses.

2. Civil Rights — 44(5)

In equal employment opportunity case, evidence that employer paid female worker's male successor almost same salary as she had been receiving although he was less experienced was not probative of sex discrimination in absence of evidence that successor's work was not done as well. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

3. Civil Rights — 44(5)

Evidence as a whole, in equal employment opportunity case, failed to sustain district court's determination that job of plaintiff female worker was "substantially equal" to other jobs, performed by men, or that there had been any discrimination by reason of sex. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. §2000e-2(a).

4. Statutes — 223.1

Sex discrimination provisions of Title VII of Civil Rights Act of 1964 must be construed in harmony with Equal Pay Act of 1963. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, §703(a), 42 U.S.C.A. § 2000e-2(a).

5. Civil Rights — 43

To establish case under sex discrimination provisions of Title VII of Civil Rights Act of 1964, it must be proved that wage differential was based upon sex and that there was performance of equal work for unequal compensation; the jobs in question need not be identical, but they must be substantially equal. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

6. Civil Rights — 9.14

Where duties of various employees were greatly dissimilar, even though each was manager of department, the performance of their jobs could not be characterized as equal work for purposes of sex discrimination provisions of Title VII of Civil Rights Act of 1964. Fair Labor Standards Act of 1938, § 6(d), (d)(1) as amended 29 U.S.C.A. § 206(d), (d)(1); Civil Rights Act of 1964, § 703(a), 42 U.S.C.A. § 2000e-2(a).

Christian D. Searcy, Alan G. Greer, Ray H. Pearson, Miami, Fla., for defendant-appellant.

Robert W. Hervey, Coral Gables, Fla., for plaintiff-appellee.

Appeal from the UnitedStates District Court for the Southern District of Florida.

Before JONES, THORNBERRY and COLEMAN, Circuit Judges.

JONES, Circuit Judge:

In a trial before the court without a jury, Elaine M. Orr recovered judgment against Frank R. MacNeill & Son, Inc., in an action for damages from sex discrimination in compensation as an employee. It has appealed.

The appellant is a rather large insurance agency in Miami, Florida. In the findings and conclusions of the District Court it is stated that:

> "Two persons are the driving forces in the defendant corporation, Frank R. MacNeill, nearly 88, who still spends at least three to four hours per working day in the office, and his son, Malcolm MacNeill, the vice president of the corporation, who testified that he is in charge of the operations of the company. The plaintiff claims that the senior MacNeill told her to come talk with him if she ever had any problems and that he was still running the show."

Notwithstanding Mrs. Orr's claim that the senior MacNeill said that he was "running the show," the events demonstrate that Malcolm MacNeill was the operating head of the agency with respect to the fixing of Mrs. Orr's compensation.

The appellee, Elaine M. Orr, went to work for the agency in 1962, it then had four employees. At the end of 1970, the critical time in this controversy, there were over forty employees. In and after 1967 the organization consisted of four departments, Fire Insurance, Casualty Insurance, Claims and Accounting.

John F. Bruns, the head of the Fire Insurance Department, was originally employed by MacNeill as a Special Agent or Field Representative. He continued in that capacity after becoming a Vice President and Manager of the Fire Insurance Department. In addition to his General Supervisory activities in the Fire Insurance Department, his duties included handling the underwriting of the Fire Insurance Department and approving or disapproving fire risks. His primary responsibility and activity was the production of business. Bruns contacted agents, collected overdue accounts, and sought to develop new business for the agency. Upon one or more occasions Bruns established commission arrangements with a company represented by the agency. Malcolm MacNeill testified that this "takes a lot of savvy."

The Casualty Insurance Department was in charge of James Moore. He was responsible for underwriting the Casualty Insurance business which was acceptable to the company. This responsibility specifically involved reviewing policies written by agents or instructing someone in the department to underwrite acceptable business. When an agent had a risk which he thought might not be acceptable to the company, the agent and Moore would discuss it, and Moore would decide whether or not to accept the risk. His job, as in the case of Bruns ,required decision making and the exercise of discretion.

The Claims Department was handled through a separate corporation which was a wholly owned subsidiary of Frank R. MacNeill & Son, Inc. It was in charge of Thomas

B. Rogan. He was responsible for assigning all claims work which came into the office, for adjusting and settling claims, and for supervising, hiring, firing, and training approximately ten professional adjusters and ten clerical workers. Rogan had unlimited draft authority with several insurance and casualty companies represented by the agency. He issued loss drafts upon determining that claims should be paid. He assisted in the development of new business. His job, like those of Bruns and Moore, required the making of decisions and the exercise of discretion.

Elaine M. Orr was head of the Accounting Department. She kept the financial and other records, she and others signed checks, she purchased supplies and supervised the maintenance of the building which housed the agency. She was sometimes consulted by those in other departments but usually with respect to accounting matters.

The salaries paid to the four department heads for the years 1966 through 1970, as found by the District Court, were as follows:

As of April	FIRE BRUNS	CASUALTY MOORE	CLAIMS ROGAN	ACCOUNTING ORR
1966	$10,400.00	$ 8,996.00	$ 9,100.00	$10,400.00
1967	11,310.00	10,010.00	10,010.00	11,700.00
1968	15,002.00	10,816.00	14,001.00	12,012.00
1969	15,522.00	12,012.00	15,600.00	13,000.00
1970	18,018.00	14,040.00	18,018.00	14,040.00

For the years 1969 through 1971 bonuses were paid as follows:

For the year	BRUNS	MOORE	ROGAN	ORR
1969	$ 1,000.00	500.00	500.00	500.00
1970	3,500.00	3,500.00	3,500.00	3,500.00
1971	3,500.00	2,500.00	3,500.00	1,500.00

Mrs. Orr has informed this court that the correct salary figures for 1967 are Bruns $15,002, Rogan $14,001 and Orr $12,012. It does not appear that any effort was made to have the court's findings corrected.

It was the testimony of Mrs. Orr, credited by the District Court although in conflict with the testimony of the elder MacNeill, that she had several discussions with him about her compensation. In 1967 she complained to him that Bruns had gone ahead of her in salary. He told her, so she said, that his son would not approve of her making as much as a man but he would try to work it out. In January 1969 she complained again to the elder MacNeill. He again advised her, so she said, that Malcolm would not approve of her making as much as a man, and he again assured her that he would try to work it out. She quoted him as telling her that she was worth as much as the men. She was aware that Malcolm MacNeill had fixed Bruns' salary.

[1] It might seem that Mrs. Orr could have decided at some time before 1970 that perhaps the elder MacNeill was not "running the show," or that part of it which involved the fixing of salaries of department heads and that possibly, in this area, Malcolm MacNeill was "in charge of the operations of the company." Malcolm MacNeill testified that she did not discuss her salary with him. She testified that she did not discuss salary with Malcolm MacNeill. On further questioning she said she thought she might have talked with him for a few minutes in 1970. Further examination elicited the response "I asked him why I couldn't —you know, why they wouldn't approve it, and he said that I didn't have any business except in the Accounting Department and that these other duties and so forth that

I handled had nothing to do with it, and he just wasn't going to sign it." It might seem strange that Mrs. Orr could remember so well all that the senior MacNeill said to her on the occasions beginning in 1967 but find it so difficult to recall the conversation with the junior MacNeill. But, of course, this Court accepts the District Court's determination on credibility.

The District Court concluded that recovery by reason of differences in bonus payments should be denied because the differentiation was based on reasons other than sex.

[2] The District Court noted that, following Mrs. Orr's resignation, the agency paid her successor almost the same salary as she had been receiving although he was less experienced. The District Court stated that this "underlines the discrimination exercised against" Mrs. Orr. This deduction does not follow. If her successor's work was done as well, and the contrary is neither found nor suggested by the District Court, it might be said that he should have been paid as well, and this we think follows whether he was more or less experienced than his predecessor or of the same or different sex.

[3] The District Court, it seems, relied upon the testimony of Messrs. Bruns and Rogan, witnesses for Mrs. Orr, as the basis for the finding that "an insurance agency operation of this size depends with success upon the efficient functioning of all of its departments." Bruns testified as to the differences between the production of business and the keeping of records and stressed the job differences. He expressed the opinion that they were of equal importance. Rogan also pointed out that the functions of the Accounting and Claims Departments were not similar, that

the duties were different, and not comparable and that there was no parallel. In response to a leading question Rogan gave an affirmative answer to a query as to whether one function was just as important as another. In her testimony Mrs. Orr recognized the differences between that which she did and that which was done by Bruns and Rogan. She conceded that her accounting activities might be called a mechanical type of thing. She recognized the necessity for the use of judgment and the exercise of discretion in the production and claims departments, and conceded that this was not so in the Accounting Department except in the procurement of supplies.

To buttress its conclusion that the difference in pay between Messrs. Bruns and Rogan on the one hand and Mrs. Orr on the other was based on sex discrimination, the District Court recited that at one time she had been the highest paid of the department heads. If this is in any way relevant it would seem to indicate an absence of sex discrimination. It is recited that three of the four department heads were Vice Presidents of the company and the fourth was the President of the subsidiary corporation. Malcolm MacNeill was a Vice President and it was he who fixed Bruns' salary and declined to pay Mrs. Orr an equal amount. We know of no rule requiring that the pay of a corporate officer shall be determined by his or her title.

The District Court included in its findings the statement that the jobs in this are not as "substantially equal" as in other cases[1] where recovery has been permitted. Does this mean that the jobs in this case are less than substan-

[1]Citing Weeks v. Southern Bell Tel. & Tel. Co., 5th Cir. 1969, 408 F.2d 228.

tially equal?[2] We cannot say. We do say that the evidence does not sustain the District Court's determination that the jobs here are substantially equal. Nor is there support for its determination that there has been discrimination by reason of sex.

The District Court decided that "based on the unique fact situation in this case, Mrs. Orr is entitled to recover." To be unique a thing, be it red cow, gray horse, peppercorn or law suit, must be the only one of its kind, without an equal or an equivalent. It may be said that every case, in some way or other, is different from every other case. Nothing presented by the record of the case before us calls for the application of a unique doctrine or requires a decision other than is dictated by the principles set forth in the precedents.

Title VII of the Civil Rights Act of 1964 provides in pertinent part:

> "It shall be an unlawful employment practice for an employer—(I) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . ." 42 U.S.C.A. Sec. 2000e-2(a).

[4] The sex discrimination provisions of Title VII of the Civil Rights Act of 1964 must be construed in harmony with the Equal Pay Act of 1963, 29 U.S.C.A. Sec. 206(d). Hodgson v. Brookhaven General Hsopital, 5th Cir. 1970, 436 F.2d 719; Ammons v. ZIA Co., 10th Cir. 1971, 448 F.2d 117; Shultz v. Wheaton Glass Co., 3d Cir., 421 F.2d 259, cert. denied, 398 U.S. 905, 90 S.Ct. 1696, 26 L.Ed.2d 64. The 1964 act provides that any differentiation which is authorized by Section 206(d) of the 1963 act shall not be unlawful under the Civil Rights Act of 1964. The statute provides in part:

> "No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . ." 29 U.S.C.A. Sec. 206(d)(1).

[5] To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation. Ammons v. ZIA Co., supra.

The jobs in question need not be identical, but they must be substantially equal. Brennan v. J. M. Fields, Inc., 5th Cir. 1974, 488 F.2d 443; Hodgson v. Corning Glass Works, 2d Cir. 1973, 474 F.2d 226; Hodgson v. Fairmont Supply Co., 4th Cir. 1972, 454 F.2d 490; Ammons v. ZIA Co., supra. This court has recently said:

[2]There is a temptation, which will be suppressed, to discuss whether "substantially equal" is equal, whether less than equal is unequal and therefore "less than substantially equal" is also unequal. Such an exercise in syllogistic semantics would serve no useful purpose here.

"When Congress enacted the Equal Pay Act, it substituted the word 'equal" for 'comparable' to show that 'the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.'" Brennan v. City Stores, Inc., 5th Cir. 1973, 479 F.2d 235.

The record does not support the determination that Mrs. Orr sustained her burden of proving equal work. The District Court stated that "an Insurance Agency operation of this size depends with success upon the efficient functioning of all of its departments." However true this may be it does not follow that all who participate in the efficient functioning are doing equal work.

The only evidence of sex discrimination is the controverted statement of Frank R. MacNeill that his son would not pay a woman as much as he paid a man. Yet the fact is that at one time Mrs. Orr was paid more than any of the men who were the other department heads. The fact is that she was paid more than the man who succeeded her and who, presumably, was doing work equal to that which she had done. The fact is that she was never paid less and much of the time was paid more than the salary of Vice President Moore who was the head of the Casualty Department. The facts show that the salary differences were based upon other reasons than the conjecture of MacNeill senior that MacNeill junior wouldn't pay a woman as much as a man. Although various phases of a business organization are essential to its operation, it does not follow that the phases involve equal work such as must be shown in an action based upon sex discrimination. Congress certainly did not intend such a result.

[6] The duties of Mrs. Orr and Messrs. Bruns and Rogan were greatly dissimilar even though each was the manager of a department. This without more precludes the characterization of the performance of their jobs as equal work. Hodgson v. Golden Isles Convalescent Homes, Inc., 5th Cir. 1972, 468 F.2d 1256.

It is clearly apparent from the undisputed evidence, including the testimony of Mrs. Orr, that Messrs. Bruns and Rogan had greater responsibility and were required to exercise greater skill in the performance of their jobs than was Mrs. Orr. Underwriting fire risks and appoving claims require the exercise of judgment and developed skill. The independent judgment of Mrs. Orr in purchasing supplies is not comparable to that involved in underwriting risks and settling claims.

The evidence failed to show sex discrimination. Judgment should have been entered for the appellant. The judgment for the appellee is reversed and the cause is remanded for the entry of a judgment for the appellant.

Reversed and remanded.

[1]

IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
SOUTHERN DISTRICT OF FLORIDA

NO. 72-698-Civ-NCR

ELAINE M. ORR,

Plaintiff,

vs.

FRANK R. MacNEIL & SON. INC.,

Defendant.

U.S. Post Office Bldg.,
Miami, Florida
January 4, 1973,
9:30 o'clock, a.m.

The above-captioned matter came on for trial before The Honorable NORMAN C. ROETTGER, JR., United States District Judge, pursuant to notice.

APPEARANCES:

ROBERT W. HERVEY, Esquire,
On behalf of Plaintiff.

ALAN G. GREER, Esquire,
On behalf of Defendant.

[28]

TESTIMONY (EXCERTED)

ORR—DIRECT

Q That was January, 1967?
A Yes, sir.

Q In 1968 apparently we have a repeat performance.
A No, there was no increase. It stayed the same.

Q In 1969 there was another increase?
A Yes, sir.

Q And differentiation?
A Yes, sir.

Q Did you make any comment to anybody about that?
A Yes, I did.

Q To whom?
A To Frank MacNeil.

Q When did you do that?
A In January, 1969, when the increase slips went in.

Q What did you say to him?
A I said the same thing. I said, "Mr. MacNeil, I just don't understand why. We work in the same capacity. Our jobs are equally important. I probably know more about the general operation of the agency than anybody

in the company and why is it my [29] salary doesn't come up to the men's salary?" Well, I got the same information from him: Malcolm would not —

Q What was that information?
A Mr. Malcolm MacNeil would not pay a woman as much as a man, but he would try to work it out.

Q Who would try to work it out?
A Frank MacNeil. To let him discuss it with his son and he would try to work it out.

Q In 1970, there was a difference?
A Yes, sir.

Q Did you complain to anybody about that difference?
A To Frank MacNeill in his office.

Q When did you do that?
A In January, 1970.

Q What did you say to him?
A I said, "Mr. MacNeil, we have been going through this since 1968 and every year you have promised to work something out."

He said, "Well, we are going to make some changes and we are going to offer some stock options to managers; and give me a little bit of time

* * *

[112] * * * Q What has been your father's position with the company, Mr. Frank R. MacNeil, over the last eight years?

A He is president of Frank R. MacNeil & Son, but in fact when he had his stroke at age 80 —

Q When did Mr. MacNeil have the stroke, sir?
A Well, it was eight years ago, approximately eight years ago, and since that time he has not been in full management at all. In fact, the last four, five years, he doesn't spend more than three, four hours a day in the office. He doesn't manage any of the insurance affairs.

Q So, effectively, you are the manager of the company?
A Yes, sir.

Q Are you also an owner of the company?
A Yes, sir.

Q What is your ownership interest in the company?
A 48 percent.